

<sup>1</sup> Claimant's Brief at 3 (filed Mar. 25, 2005).

Consequently, claimant requests the Board to reverse the Judge's finding and to determine this claim is compensable under the Workers Compensation Act.

Conversely, respondent and its insurance carrier contend the March 3, 2005, Order should be affirmed. In light of the other witnesses who testified at the preliminary hearing, respondent and its insurance carrier argue claimant is not credible. They also point out claimant failed to present any expert medical opinion that indicated claimant's hernias were either caused or aggravated by his work activities. In short, they feel claimant failed to satisfy his burden of proof.

The only issue before the Board on this appeal is whether claimant proved his hernias were either caused or aggravated by the work he performed for respondent.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and the parties' arguments, the Board finds and concludes the March 3, 2005, Order should be affirmed.

The record is not entirely clear when claimant began working for respondent, a company that installs auto glass and performs other automotive repairs. But claimant had commenced his employment with respondent by September 2004. According to claimant, on December 3, 2004, he noticed a lump in his stomach shortly after removing a windshield from a car or truck. Later that afternoon, claimant reported to the respondent's owner, Robert L. Graham, that he had hurt himself cutting out a windshield. At the preliminary hearing, claimant described how his job often required him to stretch over the hood of a car or pickup while pulling on a hand tool to cut out a windshield.

Claimant testified he continued to work for respondent for another week, despite the lump in his stomach. During that week, claimant's symptoms allegedly progressed to the point he was unable to cut out a windshield by hand. Claimant also testified that on December 10, 2004, he again spoke with Mr. Graham about being hurt and about needing treatment. Claimant testified Mr. Graham responded by stating that claimant probably had a hernia.

On December 15 or 17, 2004, claimant saw Dr. David S. Richman. According to Dr. Richman's notes, claimant complained of lower abdominal pain that he associated with removing windshields. The doctor's office notes from that visit read, in pertinent part:

The patient was seen today complaining of lower abdominal pain. He has been working at a windshield repair company. He states removing windshields requires quite a bit of straining. He has developed bulging and discomfort in his lower

abdomen. He is concerned he might have developed a hernia. In addition, he has had problems with hemorrhoids with this current work. . . .

The patient does demonstrate bilateral inguinal hernia and a left abdominal wall hernia. He also has external hemorrhoids. The bowel sounds are active. There is no rebound or guarding present. . . .<sup>2</sup>

Dr. Richman diagnosed bilateral inguinal hernias and referred claimant to Dr. Scott G. Clarke, who saw claimant on December 17, 2004. The office notes of that date from Dr. Clarke provide additional history about claimant's injuries:

I have been asked to consult on this patient by Dr. Richman for bilateral groin bulges. The patient is a 50-year-old male who over the last several months has noted some discomfort in his groins. He does a lot of heavy lifting and straining at work and said that he noticed definitely a week ago today, on 12/10/2004, really noticed a bulge in his left side and saw Dr. Richman and presents now. . . .<sup>3</sup>

Dr. Clarke confirmed the diagnosis of bilateral inguinal hernias and recommended surgery. At the March 3, 2005, preliminary hearing, claimant requested authority to undergo that surgery.

Mr. Graham testified at the preliminary hearing that in approximately September 2004 claimant first reported hurting his stomach from lifting his motorcycle that was on its side. Mr. Graham vehemently denies that claimant ever mentioned hurting his stomach or groin at work. Mr. Graham contends he first learned that claimant was claiming being injured at work after receiving a telephone call from the clinic where claimant had sought medical treatment.

Claimant, however, denied injuring himself from handling his bike. Nonetheless, claimant did recall an incident that occurred shortly after he bought the motorcycle in about April 2004 that required him to lift and upright the bike after it had fallen over.

Respondent and its insurance carrier also presented the testimony of Will McConnell at the preliminary hearing. According to Mr. McConnell, claimant advised he may have pulled something in his "gut" picking up his motorcycle after it had fallen over on its side. And Mr. McConnell believed that conversation occurred sometime in September 2004 as it was sometime shortly before Mr. Graham's birthday.

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<sup>2</sup> P.H. Trans., Cl. Ex. 2.

<sup>3</sup> *Id.*

As respondent and its insurance carrier emphasize, at this juncture the record does not contain any expert medical opinion that addresses the mechanism of claimant's injuries. Accordingly, the record is void of any evidence that establishes the work claimant performed for respondent, or the manner in which claimant performed such work, was medically competent to either cause claimant's hernias or aggravate a preexisting injury or condition. In commenting on the evidence, Judge Moore stated, in part:

Well, this is an interesting case. Somebody's lying. Somebody's just flat out lying.

Mr. Wright, I don't know whether you injured your groin lifting your motorcycle in September, I don't know whether you thereafter aggravated your hernias by the work activities that you performed for respondent. That just isn't clear from the record. The evidence and testimony presented today does not satisfy claimant's preliminary hearing burden of establishing more probably than not that this injury was suffered at work. I frankly have a gut feeling, if you'll pardon the pun, that Mr. Wright probably hurt himself lifting his motorcycle and thereafter probably aggravated that condition performing his work activities, but I don't have that evidence. That evidence is certainly still within counsels' grasp if they want to go out and develop it, but the evidence presented today does not establish more probably than not that the hernias arose out of and in the course of employment, and for that reason claimant's preliminary hearing requests are denied.<sup>4</sup>

At this juncture of the claim, the Board agrees with the Judge's conclusion that claimant has failed to satisfy his burden of proof that he has sustained an accidental injury that arose out of and in the course of his employment with respondent.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.<sup>5</sup>

**WHEREFORE**, the Board affirms the March 3, 2005, Order entered by Judge Moore.

**IT IS SO ORDERED.**

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<sup>4</sup> P.H. Trans. at 77-78.

<sup>5</sup> K.S.A. 44-534a(a)(2).

Dated this \_\_\_\_ day of May, 2005.

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BOARD MEMBER

c: Larry A. Bolton, Attorney for Claimant  
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director